Supreme Court, U.S.
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No. 88-1855

In The

Supreme Court of the United States

October Term, 1988

GAILE HENRY, SR.,

Petitioner,

v.

BEAUMONT IRON & METAL CORPORATION, BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., AND FIRST CITY NATIONAL BANK OF BEAUMONT

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Do the protections of ERISA remain in force once all benefits are paid and the plan is terminated?

2. Did the court of appeals correctly affirm the U. S. district court's dismissal of Petitioner's complaint and granting Respondents' motions for summary judgment by concluding that the "Agreed Temporary Order" consented to by Petitioner and signed by Petitioner's attorneys was not prohibited by ERISA and did not constitute a wrongful garnishment or attachment of Petitioner's benefits?

3. Was the court of appeals correct in affirming the U. S. district court's granting of the Respondents' motions for summary judgment by concluding that no breach of any fiduciary duty owed Petitioner occured by:

(a) The agreed temporary order requiring the Petitioner, upon distribution from the Retirement Plan, to deposit a portion of his retirement benefits into an Individual Retirement Account or interest bearing account, subject to further court orders;

(b) Respondent Beaumont Iron & Metal Corporation's ("BIMCO") attorney taking possession of a check representing a portion of a distribution to the Petitioner pursuant to an agreement between the attorneys for Petitioner and Respondent BIMCO, in contemplation of the state court signing the "Agreed Temporary Order;"

(c) After distribution of the benefits, the signing of a court order requiring the Petitioner to comply with the "Agreed Temporary Order" and deposit a portion of the distributed funds into the registry of the court?

LIST OF PARTIES

1. Gaile Henry, Sr., Petitioner.

2. Beaumont Iron & Metal Corporation, Respondent.

3. Beaumont Iron & Metal Corporation Profit Sharing Plan. This Plan is no longer in existence and is listed here only for completeness and continuity of the Brief.

4. Gaile Henry, Jr., Respondent.

5. First City National Bank of Beaumont, Respondent.

6. Sue Henry Guseman, Shareholder of Beaumont Iron & Metal Corporation.

7. Mark Freeman, Attorney for Beaumont Iron & Metal Corporation, Beaumont Iron & Metal Corporation Profit Sharing Plan, and Gaile Henry, Jr.

8. S. L. Greenberg, Attorney for Beaumont Iron & Metal Corporation, Beaumont Iron & Metal Corporation Profit Sharing Plan, and Gaile Henry, Jr.

9. Wells, Peyton, Beard, Greenberg, Hunt and Crawford, of Counsel for Beaumont Iron & Metal Corporation, Beaumont Iron & Metal Corporation Profit Sharing Plan, and Gaile Henry, Jr.

10. James Weber, Attorney for First City National Bank of Beaumont.

11. Mehaffy, Weber, Keith & Gonsoulin, of Counsel for First City National Bank of Beaumont.

12. C. Leland Hamel, Attorney for Petitioner.

13. Hamel, Rouner, Reigel & Strong, of Counsel for Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 165 (1986) 6, 7

Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986) 7

Jones v. Commissioner, 82 T.C. 586 (1984) 5

Mangum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922 2

Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 7

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614 (1955) 2

Tenneco, Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983) 5, 6

STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1001, et seq. 2

28 U.S.C. § 1254(1) 1

MISCELLANEOUS

S. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*. The Review of Litigation, 263, 268 & 278 (1987) 7

Supreme Court Rule 17.1 ..... 1, 2

Rule 56, Federal Rules of Civil Procedure 6

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

In an unpublished *per curiam* opinion, the United States Court of Appeals for the Fifth Circuit affirmed the order of the district court granting Respondents' motions for summary judgment, denying Petitioner's motion for summary judgment, and entering final judgment. Included as Appendix A is the Order Denying Petitioner's Petition for Rehearing. The court of appeals' opinion is included as Appendix B. The order granting Respondents' motions for summary judgment, denying Petitioner's motion for summary judgment and entering final judgment is included as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on January 18, 1989. An order denying the petition for rehearing was entered on February 15, 1989. Under 28 U.S.C. § 1254(1), Petitioner asks this Court to grant writ of certiorari.

Review of a petition for a writ of certiorari is a matter of judicial discretion. Supreme Court Rule 17.1. Additionally, the Court will exercise its discretion and grant certiorari only when there are "special and important reasons therefor." Supreme Court Rule 17.1.

Respondents urge the Court that there are no special and important reasons for granting review in this case. Petitioner fails to identify specific reasons for granting review by writ of certiorari. In deciding this case, the Court of Appeals for the Fifth Circuit did not decide an

important federal question contrary to established precedent which should be settled by this Court. Supreme Court Rule 17.1(c). Any federal question which may be raised by Petitioner simply does not rise to the level necessary for review by this Court.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614 (1955), citing *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922 (1923).

STATEMENT OF THE CASE

This action was brought by Petitioner, Gaile Henry, Sr., on April 10, 1987, under the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §1001, et seq. This case was filed against BIMCO, Beaumont Iron & Metal Corporation Profit Sharing Plan ("Profit Sharing Plan"), and First City National Bank of Beaumont ("Bank"), which acted as trustee of the profit sharing plan. Petitioner and each Respondent filed motions for summary judgment. The trial court granted each Respondent's motion for summary judgment and denied Henry's motion. Henry appealed the judgment of the trial court to the Court of Appeals for the Fifth Circuit. In a *per curiam* opinion, the court of appeals affirmed the trial court.

STATEMENT OF FACTS

Through a colored and skewed recitation of the purported facts, Petitioner seeks to create a cause of action under ERISA. Petitioner incorrectly states that the court of appeals' opinion did not address or discuss either the law or the facts of this case. (Page 7, Petition for Writ of Certiorari). Petitioner fails to mention that the trial court, in considering all motions for summary judgment had extensive affidavits, deposition testimony, and numerous exhibits before it at the time the order granting Respondents' motions for summary judgment were granted. This extensive record, including Petitioner's affidavit, was reviewed, *de novo*, by the court of appeals. Additionally, oral argument was granted by the Court of Appeals before it rendered its *per curiam* decision. As set forth in its opinion, the Fifth Circuit concluded that:

(1) The profit sharing plan was terminated and full distribution of Petitioner's benefits was made to him in 1986.

(2) Petitioner's attorney agreed to the termination of the plan in November 1986 and requested the trustee bank's delivery to S. L. Greenberg on December 31, 1986 of checks payable to Petitioner, to be held by S. L. Greenberg.

(3) This delivery was made in order to ensure that Petitioner would be deemed to have received this distribution in 1986 for income purposes.

(4) No evidence existed that the Respondents breached any fudiciary duty owed to Petitioner under ERISA or the plan.

(5) The Bank acted only as authorized by Petitioner.

(6) Petitioner, on January 6, 1987, agreed to the state court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. (Appendix C).

After finding that no genuine issue of material fact existed as to this chronology, the court of appeals concluded that the election by Petitioner and the state court's subsequent judgment cannot be undone by this suit because the $200,000 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

Contrary to the representations of Petitioner, no mandatory injunction was issued by the Texas district court. The court of appeals, along with the trial court, properly concluded that no improper attachment, garnishment, or restriction occurred as a result of the Respondents' conduct. Throughout these proceedings, Petitioner has ignored the rudimentary facts recited above which have been found to exist by two tribunals. Petitioner ignores his own conduct and that of his counsel in these proceedings. As found by the court of appeals, the facts in this case do not support Petitioner's assertions that Respondents circumvented the anti-assignment and anti-alienation provisions of ERISA.

ARGUMENT

A key issue in this litigation is the time of the distribution of Petitioner's vested benefits from the profit sharing plan. Once a distribution occurs, the funds are no longer protected from attachment by creditors. *See, Tenneco, Inc. v. First Virginia Bank of Tidewater,* 698 F.2d 688 (4th Cir. 1983). As has always been conceded by Petitioner in this litigation, the point in time when a participant in a qualified retirement plan incurs tax liability for distributions from a plan is also the time when a distribution will be recognized to have occurred for purposes of ERISA. In *Jones v. Commissioner,* 82 T.C. 586 (1984), the taxpayer assigned his unconditional right to receive funds in a protected retirement plan to his employer in exchange for the employer's agreeing to a reduction of a criminal charge against the employee. The employee signed a general release relinquishing his interest in the qualified retirement plan. On the date the employee was sentenced on the lesser charge, a check representing the amount due the employee from the qualified retirement plan was presented to the employee for his endorsement by the employer's attorney. "Without the check ever leaving the hands of Magna's [employer's] counsel, Petitioner endorsed the check back to Magna in accordance with the general release he [taxpayer] had previously executed." *Id.* at 588. The United States Tax Court also stated: "Further, even if we were to accept Petitioner's argument that he did not actually or constructively receive such funds, he clearly assigned his unconditional right to receive this money which would still require inclusion in his income." 82 T.C. at 590. The tax court went on to hold that a distribution had occurred.

Petitioner's voluntary agreement to restrict a portion of the funds he received from the profit sharing plan of BIMCO was not a restriction against the plan itself (which had been terminated), but spoke only about funds after they had been distributed to Petitioner. Under the *Jones* decision, this would still require Petitioner to include these funds in his income, which is the point in time that Petitioner admits a distribution would occur. Therefore, a distribution of the $200,000 resulted. As cited above, once a distribution occurs, the funds are no longer protected from attachment by creditors. *See, Tenneco, Inc. v. First Virginia Bank of Tidewater, supra.*

As correctly found by the court of appeals, Petitioner's attorney at the time the $200,000 check was issued by the bank recognized that the funds had been "distributed." Only Petitioner's belated efforts in this litigation, all of which occurred after the plan was terminated and all funds are admitted to have been distributed from the plan's trust account, have attempted to establish something sinister concerning the agreement between Mr. Greenberg and Petitioner's attorney.

The trial court properly concluded that, as a matter of law, no material issue of fact exists to support an essential element of Petitioner's alleged causes of action against Respondent under ERISA. The initial movant's burden under a Rule 56, Federal Rule of Civil Procedure, summary judgment motion is relatively light. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 165 (1986). The moving party shifts the burden of production of evidence to the non-moving party by simply pointing out that the non-movant plaintiff has failed to make a preliminary showing of an essential element of

his prima facie case. *Celotex*, 91 L.Ed.2d at 273-74. *See also, Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1192 (5th Cir. 1986). Once the burden of production shifts, the non-moving party must show that there is sufficient evidence in the pre-trial record to support a plaintiff's verdict at trial and not merely that sufficient evidence exists to raise an inference to be resolved at trial. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 587, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986). The court must grant summary judgment even when factual conflicts exists if the conflicts are not substantial (genuine) or if they are not legally material. *See also*, S. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*. The Review of Litigation, 263, 268 & 278 (1987).

As found by the trial court and affirmed by the court of appeals, Petitioner failed to present any summary judgment evidence to create a genuine issue or material fact. Petitioner's shifting burden under *Celotex* was not addressed; the summary judgment was proper.

In addition to allegations in the federal courts, Petitioner also asserted in his state court action that his vested benefits in the plan had been improperly attached. However, the state court held: (i) Petitioner timely received a distribution of his vested benefits in the terminated plan on December 31, 1986; (ii) the distribution to Petitioner from the terminated plan was not protected by ERISA once the distribution had been made on December 31, 1986; and (iii) no improper alienation, attachment, or garnishment occurred as a result of the state court's entry of the agreed temporary order (signed January 6, 1987), or the order granting BIMCO's motion for protective

order for depositing funds in the registry of the court (signed February 25, 1987), or the final judgment granted BIMCO against Petitioner. (Exhibit 2, Respondents' First Supplement to their Motion for Summary Judgment). The final judgment in the state court action was appealed by Petitioner to the Texas Court of Appeals, 9th District, and affirmed in all respects. Petitioner's application for writ of error to the Texas Supreme Court was denied June 15, 1988. Contrary to Petitioner's belated assertions in this litigation, no illegal encroachment of Petitioner's retirement benefits occurred in the state court litigation.

CONCLUSION

As found by the court of appeals, the record in this case supports the trial court's specific factual findings contained in the February 25, 1988 order granting summary judgment.

Petitioner has failed to direct this Court to a single case in support of his proposition that once all benefits are paid and a plan is terminated, the protection of ERISA remains in force and effect. The simple reason is that no such cases exist. Once a plan is terminated and the benefits are distributed, the congressionally mandated protections and restrictions of ERISA disappear.

Petitioner's argument is not based on judicial precedent or statute, but is based on his skewed and colored representation of the facts. Petitioner's representation that this case threatens to undermine the integrity of the entire retirement system is a gross mischaracterization of

the facts and legal issues in this case. The sum of Petitioner's legal authorities is contained on one page of Petitioner's Petition for Writ of Certiorari, none of which is directly applicable to the facts of this case.

Respondents request that the Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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Sharing Plan, and Gaile Henry, Jr.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2192

GAILE HENRY, SR.,

Plaintiff-Appellant,

versus

BEAUMONT IRON AND METAL CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING
(February 15, 1989)

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas M Reavley
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2192

GAILE HENRY, SR.,

Plainitiff-Appellant,

versus

BEAUMONT IRON & METAL CORP., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas
(CA-B-87-0503)

(January 18, 1989)

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:*

The summary judgment in favor of the defendants is affirmed because, as the district court said in its order of February 25, 1988, the Profit Sharing Plan was terminated and full distribution of plaintiff's benefits was made to

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

him in 1986. Plaintiff's attorney agreed to the termination of the plan in November and to the trustee bank's delivery on December 31 of checks payable to plaintiff, to be held by S. L. Greenberg. This delivery was made in order to ensure that plaintiff would be deemed to have received this distribution in 1986 for income purposes.

Prior to 1987 there is no evidence that any defendant breached a fiduciary duty owed to plaintiff under ERISA or the plan. The bank acted only as was authorized by plaintiff. Plaintiff on January 6, 1987 agreed to the court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. That election by plaintiff and the court's subsequent judgment cannot be undone by the present suit, because the $200,00 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GAILE HENRY, SR.)	
VS.)	
BEAUMONT IRON AND)	
METAL CORPORATION,)	
BEAUMONT IRON AND)	C.A. NO. B-87-0503-CA
METAL CORPORATION)	(Filed Feb. 25, 1988)
PROFIT-SHARING PLAN,)	
GAILE HENRY, JR., and)	
FIRST CITY NATIONAL)	
BANK OF BEAUMONT)	

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FINAL JUDGMENT

ON THE 25 day of February, 1988, came on to be considered the Defendants, Beaumont Iron and Metal Corp. ("Beaumont Iron"), Beaumont Iron and Metal Corp. Profit Sharing Plan ("Profit Sharing Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("First City")'s Motions for Summary Judgment. The Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment also came on for consideration. The Court, after reviewing the Defendants' Motions, the Plaintiff's Response thereto, the Plaintiff's Motion and the Defendants' Responses in Opposition thereto, as well as the affidavits, exhibits, arguments and authorities submitted by the respective counsel, finds that a distribution to Gaile Henry, Sr. (Plaintiff herein) of his vested benefits in the terminated Profit Sharing Plan was made to him, and the distributed

funds were not thereafter protected by ERISA. The Court finds that no improper alienation, attachment or garnishment occured as a result of the conduct of, or actions by the Defendants in Cause No. A-125,223 before the 58th Judicial District Court, Jefferson County, Texas (hereinafter "state court action"). At the time the Plaintiff filed this litigation (April 10, 1987), all funds had been distributed from the Profit Sharing Plan Trust Account and the Project Sharing Plan had been terminated. Additionally, Plaintiff failed to exhaust his administrative remedies as required by the Profit Sharing Plan and ERISA during the time preceding the distribution of his retirement benefits. Although funds may be traceable to an ERISA approved plan, the Court finds that those funds are not protected by ERISA once distribution is made. The Court also finds no evidence that First City, as Trustee of the Profit Sharing Plan, breached any of its fiduciary duties to Plaintiff. Based on the foregoing, the Court finds that Defendants are entitled to summary judgment, as no genuine issue of material fact exists; that the Defendants have no liability to the Plaintiff under ERISA or the causes of action set forth in Plaintiff's Original Complaint. The Defendants' Motions for Summary Judgment should be granted that the Plaintiff take nothing by reason of his suit. The Plaintiff's Motion for Summary Judgment should be denied. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants, Beaumont Iron and Metal Corp., Beaumont Iron and Metal Corp. Profit Sharing Plan, Gaile Henry, Jr., and First City National Bank of Beaumont's Motions for Summary Judgment are hereby GRANTED and said Defendants are DISCHARGED from any liability to the

Plaintiff and judgment is awarded the Defendants that the Plaintiff take nothing by reason of this suit. It is further,

ORDERED, ADJUDGED and DECREED that the Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment is hereby DENIED.

SIGNED this 25th day of February, 1988.

/s/ Joe J. Fisher
UNITED STATES DISTRICT
JUDGE